IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 2378 of 1996

For Approval and Signature:

HONOURABLE MR.JUSTICE JAYANT PATEL

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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UPENDRABHAI MAGANBHAI PATEL - Petitioner(s)
Versus
STATE OF GUJARAT & 1 - Respondent(s)

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Appearance :
MR AJ PATEL for Petitioner(s) : 1,
RULE SERVED BY DS for Respondent(s) : 1 – 2.
MR N. SONI, AGP for State

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CORAM : HONOURABLE MR.JUSTICE JAYANT PATEL

Date : 29/01/2007

ORAL JUDGMENT

1. The short facts of the case are that the petitioner applied for permission for

construction over a portion of the land bearing Survey No.1082/2 to the Nadiad Urban Development Authority. The permission came to be granted on 22.4.1993 by the said Urban Development Authority. Thereafter, as per the petitioner, the plinth level construction was made and at that stage, the District Collector initiated proceedings under the Bombay Land Revenue Code (hereinafter referred to as “the Code”) and on 31.1.1994, the District Collector passed the order for removal of the construction on the ground that the conditions of order dated 15.2.1984 were not complied with and fresh permission under Section 65 of the Code was also not obtained. The petitioner carried the matter before the State Government in revision, which came to be decided on 26.2.1996 and the State Government observed that the permission was required to be obtained under Section 65 of the Code and as, in any case, the conditions were not complied with when the permission was granted under the Code in the year 1984, the order of the Collector was proper and,

therefore, the revision was dismissed. It is under these circumstances the present petition.

2. Heard Mr.Shital R. Patel for Mr.A.J.Patel, learned Counsel for the petitioner and Mr.Soni, learned AGP for the State Authorities.

3. Mr.Patel, learned Counsel appearing for the petitioner, contended that in view of the decision of this Court in case of **"Karimbhai Kalubhai Belim and Ors v. State of Gujarat and Anr.", reported in 1996(1) GLH, 200** permission under Section 65 of the Code is not to be obtained if the permission is already granted under Gujarat Town Planning and Urban Development Act (hereinafter referred to as "the T.P. Act"). He submitted that in the year 1999 there was amendment in the T.P. Act, whereby Sub-section (A) of Section 117 is deleted, but the same at the most would apply prospectively and it would not alter the position of law as already laid down by this Court in the above referred decision. In support of his contention, he also relied upon the decision of the Division Bench of this Court dated

17.12.2003 in LPA No.205 of 1999 in SCA No.2365 of 1998 and, therefore, he submitted that as per the view taken by the Division Bench in the said decision, for the construction made prior to 1999 cannot be said as illegal merely because the permission is not obtained under Section 65 of the Code and, therefore, he submitted that the order passed by the Collector and its confirmation thereof by the State Government deserve to be quashed and set aside.

4. Mr.Soni, learned AGP has supported the order passed by the lower authorities.

5. It deserves to be recorded that it is not a case where the construction permission came to be cancelled by the District Collector since no permission under Section 65 of the Code was obtained, but it appears that the District Collector exercised the power under the Code and directed for removal of the construction, which was made up to plinth level on the ground that there were breach of the conditions of the order dated 15.2.1984 and the permission under Section 65 of the Code was not obtained. As such

neither before the Collector nor before the State Government in revision proceedings the contention was raised that in view of Section 117(A) as then was in existence, the permission under Section 65 of the Code was not required. It is true that a question of law may be permitted to be adjudicated before this Court in a petition under Article 227 of the Constitution of India, but it is not purely a question of law and it appears that the same would be a mixed question of law and fact. Therefore, it would be required for the District Collector to examine the aspects of applicability of Section 117(A) as was then in existence to the extent of construction already made.

6. However, even if it is considered on the basis that the permission may not be required under Section 65 of the Code qua the construction already made pursuant to the permission granted in the T.P. Act, then also the fact remains that as per the panchnama and the recording of the factual position in the order of the lower authorities, the construction was made only up

to the plinth level when the Collector had exercised the power. Further, the same position has continued pending the proceedings before the revisional authority inasmuch as the order of the Collector is not set aside but is confirmed. This Court while entertaining the petition has directed the parties to maintain the status-quo. Therefore, if the construction is made prior to the District Collector passed the order, the question required to be considered would be as to whether any further construction can be permitted after 1999 in absence of the permission under Section 65 of the Code, more particularly after the deletion of Sub-section (A) of Section 117 of T.P. Act. It appears that if the construction was not made prior to the amendment in 1999, it may stand on a different footing, but if the construction is already made prior to the amendment of 1999 in T.P. Act, the decision of this Court may be of help to the petitioner. I find that it may not be necessary for this Court to finally conclude on the said aspect since the matter, in any case, is up till

now not examined by the District Collector or by the State Government at any stage.

7. Under the above circumstances, it appears that since the applicability of the provisions of Section 117 and more particularly Sub-Section(A) as then was in existence was not at all considered by the Collector or by the State Government, the matter deserves to be remanded to the Collector for reconsideration. At that stage the petitioner may rely upon the above referred decision of this Court and the District Collector shall consider the matter for the applicability of such decision read with the facts and situation of the present case and the observations made by this Court hereinabove and shall take appropriate decision in accordance with law.

8. In the result, the impugned order passed by the District Collector and its confirmation thereof by the State Government is quashed and set aside with the direction to the District Collector to reconsider the matter in light of the observations and directions given hereinabove

and the order shall be passed by the District Collector as early as possible, preferably within a period of six months from the date of receipt of the order of this Court. Until a fresh order is passed by the District Collector, the interim relief granted by this Court shall continue to remain in operation.

9. The petition is partly allowed to the aforesaid extent. Rule partly made absolute accordingly. Considering the facts and circumstances of the case, there shall be no order as to costs.

29.1.2007 **(Jayant Patel, J.)**

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